

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOHN HENRY WINTERS,

No. C 10-2826 SI (PR)

Petitioner,

**ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS**

v.

GREG LEWIS, Warden,

Respondent.

INTRODUCTION

This is a federal habeas corpus action filed by a *pro se* state prisoner pursuant to 28 U.S.C. § 2254. For the reasons set forth below, the petition is DENIED.

BACKGROUND

In 2006, petitioner, who was tried with a co-defendant, was convicted in an Alameda County Superior Court of assault by force likely to produce great bodily injury, burglary, robbery, receiving stolen property and the unlawful taking of a vehicle. The crimes were alleged to have been the result of gang activity, and were committed in 2004. The jury found true various sentencing enhancement allegations, yet found not true all criminal street gang

1 allegations. Petitioner received a sentence of 21 years and 4 months in state prison. As grounds
2 for federal habeas relief, petitioner claims that (1) his right to due process was violated when
3 evidence of a prior conviction was admitted at his trial; (2) the prosecutor committed misconduct
4 during closing argument by improperly commenting on petitioner's refusal to testify; and (3) his
5 rights to due process and a jury trial were violated when the trial court failed to instruct the jury
6 that it had to unanimously agree on which act constituted the burglary.

8 STANDARD OF REVIEW

9 This Court may entertain a petition for writ of habeas corpus "in behalf of a person in
10 custody pursuant to the judgment of a State court only on the ground that he is in custody in
11 violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The
12 petition may not be granted with respect to any claim that was adjudicated on the merits in state
13 court unless the state court's adjudication of the claim: "(1) resulted in a decision that was
14 contrary to, or involved an unreasonable application of, clearly established Federal law, as
15 determined by the Supreme Court of the United States; or (2) resulted in a decision that was
16 based on an unreasonable determination of the facts in light of the evidence presented in the
17 State court proceeding." 28 U.S.C. § 2254(d).

18 "Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court
19 arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or
20 if the state court decides a case differently than [the] Court has on a set of materially
21 indistinguishable facts." *Williams (Terry) v. Taylor*, 529 U.S. 362, 412–13 (2000). "Under the
22 'unreasonable application' clause, a federal habeas court may grant the writ if the state court
23 identifies the correct governing legal principle from [the] Court's decisions but unreasonably
24 applies that principle to the facts of the prisoner's case." *Id.* at 413. "[A] federal habeas court
25 may not issue the writ simply because that court concludes in its independent judgment that the
26 relevant state-court decision applied clearly established federal law erroneously or incorrectly.
27 Rather, that application must also be unreasonable." *Id.* at 411. A federal habeas court making
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1 the “unreasonable application” inquiry should ask whether the state court’s application of clearly
2 established federal law was “objectively unreasonable.” *Id.* at 409.

3 4 DISCUSSION

5 I. Prior Conviction Evidence

6 Petitioner claims that the admission of a prior conviction — a 1998 conviction for assault
7 with a deadly weapon, which an expert witness testified was gang-related — violated his right
8 to due process because it constituted impermissible propensity and character evidence. The trial
9 court admitted the evidence under California Evidence Code section 1101(b) (“Evidence of
10 character to prove conduct”) because the conviction was relevant to the truth of the sentencing
11 enhancement allegation that petitioner committed the charged assault for the benefit of a street
12 gang, *see* Cal. Penal Code § 186.22. The state appellate court rejected petitioner’s due process
13 claim because the evidence was relevant for the reasons stated by the trial court. (Ans., Ex. C4
14 at 5–6.)

15 The admission of evidence is not subject to federal habeas review unless a specific
16 constitutional guarantee is violated or the error is of such magnitude that the result is a denial
17 of the fundamentally fair trial guaranteed by due process. *See Henry v. Kernan*, 197 F.3d 1021,
18 1031 (9th Cir. 1999). In order to obtain habeas relief on the basis of an evidentiary error, a
19 petitioner must show that the error was one of constitutional dimension and that it was not
20 harmless under *Brecht v. Abrahamson*, 507 U.S. 619 (1993). He would have to show that the
21 error had “‘a substantial and injurious effect’ on the verdict.” *Dillard v. Roe*, 244 F.3d 758, 767
22 n.7 (9th Cir. 2001) (quoting *Brecht*, 507 U.S. at 623). Also, significantly, habeas relief may be
23 granted only if there are no permissible inferences that the jury may draw from the evidence.
24 *See Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir. 1991).

25 Petitioner’s claim cannot succeed because no remediable constitutional violation
26 occurred. The United States Supreme Court has left open the question whether admission of
27 propensity evidence violates due process. *Estelle v. McGuire*, 502 U.S. 62, 75 n. 5 (1991).

1 Because the Supreme Court has reserved this issue as an “open question,” the Ninth Circuit has
2 held that a petitioner’s due process right concerning the admission of propensity evidence is not
3 clearly established for purposes of review under AEDPA. *Alberni v. McDaniel*, 458 F.3d 860,
4 866–67 (9th Cir. 2006). Even if the evidence were irrelevant or prejudicial, the Supreme Court
5 “has not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence
6 constitutes a due process violation sufficient to warrant issuance of the writ.” *Holley v.*
7 *Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009). Additionally, as the jury found the gang
8 allegation untrue, it is reasonable to conclude that the jury rejected the significance of the 1998
9 conviction evidence, and therefore there was no prejudice.

10 Furthermore, admission of prior act evidence to show intent, motive, identity, or common
11 plan or scheme, has been found constitutionally permissible. *See, e.g., McGuire*, 502 U.S. at
12 70–72 (intent); *Williams v. Stewart*, 441 F.3d 1030, 1040 (9th Cir. 2006) (identity and intent);
13 *Boyde v. Brown*, 404 F.3d 1159, 1172–73 (9th Cir. 2005) (common plan or scheme); *Windham*
14 *v. Merkle*, 163 F.3d 1092, 1103–1104 (9th Cir. 1998) (motive). As it was permissible for the
15 jury to infer that petitioner committed the crime for the benefit of a gang, no habeas relief can
16 be granted. *See Jammal*, 926 F.2d at 920. Accordingly, petitioner’s claim is DENIED for want
17 of merit.

18 19 **II. Alleged Prosecutorial Misconduct**

20 Petitioner claims that the prosecutor committed misconduct by (1) calling attention to the
21 fact that petitioner did not testify at trial, thereby violating his Fifth Amendment rights as those
22 rights are defined in *Griffin v. California*, 380 U.S. 609 (1965); and (2) making improper
23 comments during rebuttal.

24 **1. Alleged Griffin Error**

25 *Griffin* error occurs, and a defendant’s privilege against self-incrimination is violated,
26 where a prosecutor on his own initiative asks the jury to draw an adverse inference from a
27 defendant’s silence, or to treat the defendant’s silence as substantive evidence of guilt. *Griffin*,

1 380 U.S. at 615. While it is proper for the prosecution to address the defense arguments, a
2 comment is impermissible if it is manifestly intended to call attention to the defendant's failure
3 to testify, or is of such a character that the jury would naturally and necessarily take it to be a
4 comment on the failure to testify. *See Lincoln v. Sunn*, 807 F.2d 805, 809 (9th Cir. 1987) (citing
5 *United States v. Bagley*, 772 F.2d 482, 494 (9th Cir. 1985).

6 Petitioner bases his *Griffin* claim on the following. At trial, petitioner presented evidence
7 of an alibi through the testimony of his grandmother. She testified that petitioner had lived with
8 her after he had been paroled, that she went to bed at 8:00 pm, and that he lived with her in the
9 summer of 2004. (Ans., Ex. C4 at 4.) The prosecutor, in his closing argument,

10 after referring to [petitioner]'s grandmother's testimony, that although other adults
11 lived in [petitioner]'s home, and perhaps were awake after 8:00 p.m. on the night
12 in question, no one else was called to say what [petitioner] had been doing later
13 that evening. After defense objections were overruled, the prosecutor stated that
certain people could have been called, 'such as other family members, brothers,
sisters, mothers,' and stated, 'that leaves something for you to wonder as well.'

14 (*Id.* at 7.) The state appellate court rejected petitioner's *Griffin* claim because the prosecutor's
15 comments "were about the defense failure to call logical third-party witnesses who might shed
16 light on [petitioner]'s whereabouts if he had not stabbed [one of the victims]. They did not refer,
17 expressly or impliedly, to [petitioner's] failure to testify and, therefore, were permissible." (*Id.*)

18 Petitioner's claim lacks merit. The state appellate court reasonably determined that no
19 *Griffin* error or prosecutorial misconduct occurred. First, petitioner presented evidence of an
20 alibi, thereby inviting the prosecutor to respond. The comments were a challenge to the strength
21 of petitioner's alibi, and therefore were a permissible comment on the evidence. Having invited
22 the response, petitioner cannot now plausibly argue that the prosecutor's comments were
23 manifestly intended to call attention to his right to remain silent. Second, the prosecutor limited
24 the possible alibi witnesses to family members, and made no mention of petitioner as one of
25 those witnesses. In sum, nothing in the comments raises an inference, let alone shows, that the
26 prosecutor was commenting on petitioner's failure to testify. Accordingly, petitioner's claim is
27 DENIED for want of merit.
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2. Other Allegedly Improper Comments

The facts underlying this prosecutorial misconduct claim, as identified by the state appellate court, are as follows:

The defense had argued that the prosecution and police did not do a lot of things that could have dispelled reasonable doubt, which led to the following exchanges during rebuttal:

‘PROSECUTOR: Ms. Kingston was talking about the various things that may not have been done. No DNA, no fingerprints found, why weren’t the items fingerprinted, how about live lineups, police procedures, various things to basically throw you off. In any investigation, more can always be done. Our system is an adversarial system. That means that the People have a lawyer, each of these gentlemen has a lawyer. If they wanted a live lineup in 2004 —

‘[Defense counsel] MS. KINGSTON: Objection, Your Honor. *Doyle*.¹

‘THE COURT: The jury should disregard the comment. Go on, counsel.

‘PROSECUTOR: If they wanted the items fingerprinted, they could have fingerprinted them.

‘MS. KINGSTON: Objection, Your Honor. *Doyle* error.

‘THE COURT: Come to the bench, please.

(Whereupon, the discussion was held off the record.)

‘PROSECUTOR: It’s a two-way street, things can be done.

‘MS. KINGSTON: Objection, Your Honor. *Doyle* error.

‘THE COURT: J[u]rors should disregard the statement.’

Defense counsel then requested that the court cite the prosecutor for misconduct and instruct the jury regarding that misconduct. She moved for a mistrial, and in the alternative, asked for a five-minute rebuttal, in particular because it was ‘not a two-way street. I don’t have those burdens.’ The court found that the prosecutor’s ‘two-way street’ remark had to do with both sides having legal representation, not any defense burden of proof and, regardless, that since the jury had been told to disregard the remarks and would again be instructed on the People’s burden of proof, there was no danger of any juror believing the defense had any burden of proof.

¹ *Doyle v. Ohio*, 426 U.S. 610 (1976), prohibits the use of a defendant’s post-arrest, post-*Miranda* silence to impeach the defense case.

1 The next day, the court instructed the jury that ‘it is the burden of the
2 People to prove [petitioner] guilty beyond a reasonable doubt as to each element
3 of each crime and offense that’s been charged and that burden never shifts to the
4 defense. And so notwithstanding some comments that . . . you may recall have
5 been made during closing arguments . . . the burden does not shift to the defendant
6 to prove anything in this case.’

7 (Ans., Ex. C4 at 7–8.) (footnote removed).

8 The state appellate court rejected petitioner’s claim that the prosecutor’s statements
9 violated his right to due process. The trial court’s “quick directives and thorough instruction
10 cured any problem that might have been caused by the prosecutor’s brief comments.” (*Id.* at 8.)

11 The state appellate court reasonably determined that no constitutional violation occurred.
12 The prosecutor’s comments were brief and were swiftly corrected by the trial court. Also, the
13 trial court later gave further instructions (1) on the prosecution’s burden of proof, (2) that the
14 jury was to follow the instructions as the trial court gave them, and (3) to disregard the lawyers’
15 instructions if they conflicted with those given by the court. (*Id.*, Ex. A3 at 1 & 6.) Jurors are
16 presumed to follow their instructions. *See Richardson v. Marsh*, 481 U.S. 200, 206 (1987).
17 Petitioner has not overcome this presumption, and there is nothing in the record to indicate that
18 the jurors did not adhere to the trial court’s instructions. Accordingly, petitioner’s claim is
19 DENIED for want of merit.

20 **III. Unanimity Instruction**

21 Petitioner claims that his right to due process was violated when the trial court refused
22 to instruct the jury that it had to unanimously agree on which act constituted the assault.

23 Petitioner is not entitled to habeas relief on this claim. Due process does not require that
24 the jury agree as to the specific acts that constituted commission of the crimes charged. The
25 Supreme Court has held that “different jurors may be persuaded by different pieces of evidence,
26 even when they agree upon the bottom line. Plainly there is no general requirement that the jury
27 reach agreement on the preliminary factual issues which underlie the verdict.” *McKoy v. North*
28 *Carolina*, 494 U.S. 433, 449 (1990) (Blackman, J, concurring); *see also Schad v. Arizona*, 501
 U.S. 624, 631–32 (1991) (rule that jurors not required to agree upon single means of commission

1 of crime, citing *McKoy*, applies equally to contention they must agree on one of the alternative
2 means of satisfying mental state element of crime). Accordingly, the claim is DENIED for want
3 of merit.

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5 **CONCLUSION**


6 The state court's denial of petitioner's claims did not result in a decision that was contrary
7 to, or involved an unreasonable application of, clearly established federal law, nor did it result
8 in a decision that was based on an unreasonable determination of the facts in light of the
9 evidence presented in the state court proceeding. Accordingly, the petition is DENIED.

10 A certificate of appealability will not issue. Reasonable jurists would not "find the
11 district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*,
12 529 U.S. 473, 484 (2000). Petitioner may seek a certificate of appealability from the Court of
13 Appeals.

14 The Clerk shall enter judgment in favor of respondent, and close the file.

15 **IT IS SO ORDERED.**

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17 DATED: November 1, 2011

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20 SUSAN ILLSTON
21 United States District Judge
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